

Before the
Federal Communications Commission
Washington, D.C. 20554

DEC 18 2002

In the Matter of)	
)	
Amendment of Section 73.202(b),)	
Table of Allotments,)	MM Docket No. 00-53
FM Broadcast Stations.)	RM-9823
(Detroit Lakes and Barnesville,)	RM-9950
Minnesota, and Enderlin, North)	
Dakota))	
)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 13, 2002

Released: December 16, 2002

By the Assistant Chief, Audio Division:

1. The Audio Division has before it a Petition for Reconsideration filed by Triad Broadcasting Company, LLC ("Triad Broadcasting") and a Petition for Reconsideration filed by Enderlin Broadcasting Company ("Enderlin Broadcasting") both directed to the *Report and Order* in this proceeding.¹ Clear Channel Broadcasting Licenses, Inc. ("Clear Channel") filed a Consolidated Opposition to Petitions for Reconsideration. Triad Broadcasting and Enderlin Broadcasting each filed a Reply to the Consolidated Opposition. For the reasons discussed below, we grant reconsideration, allot Channel 233C1 to Enderlin, North Dakota, and revise the reference coordinates for the Channel 236C1 allotment at Barnesville, Minnesota.

Backgound

2. At the request of T&J Broadcasting, former licensee of Station KRVI (formerly KFGX), Channel 236C1, Detroit Lakes, Minnesota, the *Report and Order* reallocated Channel 236C1 to Barnesville, Minnesota, and modified the Station KRVI license to specify Barnesville as its community of license.² This would provide Barnesville, population of 2,066, with a first local service. In doing so, the *Report and Order* denied a counterproposal filed by Enderlin Broadcasting proposing the allotment of Channel 233C1 to Enderlin, North Dakota, as a first local service. The *Report and Order* also rejected an argument advanced by Triad Broadcasting that due to proximity of the Fargo-Moorhead Urbanized Area, the proposed reallocation to Barnesville is not entitled to consideration as a first local service.³

3. T&J Broadcasting filed its request pursuant to Section 1.420(i) of the Commission's Rules

¹ *Detroit Lakes and Barnesville, Minnesota, and Enderlin, North Dakota*. 16 FCC Rcd 22581 (M.M. Bur. 2001) ("Report and Order").

² Clear Channel is now the licensee of Station KRVI.

³ Triad Broadcasting is the licensee of FM Station KPFX, Fargo, North Dakota, FM Station KLTA, Breckenridge, Minnesota, AM Station KQWB, West Fargo, North Dakota, and FM Station KVOX and FM Station KQWB, Moorhead, Minnesota.

which permits the modification of a station authorization to specify a new community of license.⁴ Under *Community of License*, we are required to determine whether the proposed change in community of license will result in a preferential arrangement of allotments. The staff compares the existing against the proposed arrangement of allotments using the FM allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*.⁵ After determining that Bamesville was entitled to consideration as a first local service, the staff compared a first local service at Bamesville against a first local service at Enderlin. In this situation, the staff determined that Bamesville, population of 2,066, was entitled to a preference over Enderlin, population of 997.

4. In support of their respective Petitions for Reconsideration, Triad Broadcasting and Enderlin Broadcasting each contend that the reallocation of Channel 236C1 to Bamesville is not entitled to consideration as a first local service due to the proximity of the Fargo-Moorhead Urbanized Area, that both of the proposals in this proceeding could have been accommodated by using the existing Station KRVI transmitter site for the proposed Bamesville reallocation and that allotting Channel 233C1 to Enderlin would result in more people receiving service. In addition, Triad Broadcasting contends that reallocation of the Station KRVI channel to Bamesville at the site set forth in the *Report and Order* would contravene Section 73.5555 of the Commission's Rules due to prohibited overlap with other stations in the Fargo-Moorhead radio market owned by Clear Channel. We will discuss each if these arguments below.

5. In its Petition for Rule Making and Reply Comments, T&J Broadcasting specifically stated that it "must relocate its transmitter site because it will be forced off its present tower by the DTV transition." T&J Broadcasting further stated that when it "realized it would be forced to leave its current site, it determined that its best course of action would be to relocate to its existing tower for KVOX(AM)." On the other hand, in their respective Petitions for Reconsideration, both Triad Broadcasting and Enderlin Broadcasting contend that Channel 236C1 could be reallocated to Bamesville at the existing Station KRVI transmitter site. In view of the need to resolve this matter on the basis of a complete record, we issued a *Request for Supplemental Information* requesting that the parties provide additional information concerning the availability of the Station KRVI transmitter site and tower.⁶

6. In response to the *Request for Supplemental Information*, Clear Channel states the tower currently being used by Station KRVI is owned by Red River Broadcast Co., LLC, licensee of Station KVRN(TV), and that Station KVRN(TV) has been granted a construction permit for DTV facilities specifying its existing tower. After referring to Commission policy of not allotting a channel when there is no available or suitable reference site, Clear Channel argues that it would be "poor allocation policy for the Commission to force upon the Barnesville allotment a reference site that will be temporary at best." In their Joint Comments, Triad Broadcasting and Enderlin Broadcasting reiterate their contention that the public interest would be best served by specifying the existing Station KRVI transmitter site for Channel 236C1 at Bamesville, and allotting Channel 233C1 to Enderlin as a first local service. With respect to the existing tower, the parties have submitted a declaration from Mark Borchert, chief engineer for Triad Broadcasting. According to the declaration, Mark Borchert contacted Kathy Lau, general manager of Station KVRN(TV). Ms. Lau stated that Station KRVI is not being required to move from the tower and expressed concern with the loss of rental income. Mark Borchert also contacted Dave Johnson, engineer for Station KVRN(TV). According to Mark Johnson, the proposed Station KVRN(TV) digital operation

⁴ See *Modification of FM and Television Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*. 5 FCC Rcd 7094 (1990) ("Community of License").

⁵ 90 FCC 2d 88 (1988). The FM allotment priorities are: (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. Co-equal weight is given to Priorities (2) and (3).

⁶ DA 02-2223 (released September 20, 2002)

would keep Station **KRVI** on the tower and that he did not contemplate any technical or structural difficulties that would require Station **KRVI** to vacate the tower.

7. On the basis of the record before us, we conclude that the existing Station **KRVI** transmitter site is, in fact, available as a reference site for the Channel 236C1 allotment at Barnesville. As such, we are modifying the *Report and Order* in this proceeding by specifying the previously licensed Station **KRVI** transmitter site as the reference coordinates for the Channel 236C1 allotment at Barnesville.⁷ In turn, this action enables us to allot Channel 233C1 to Enderlin, North Dakota, as a first local service? Our action in this proceeding is consistent with prior actions in which we have specified reference coordinates that would accommodate otherwise mutually exclusive proposals.⁹

8. It continues to be our view that reallocation of Channel 236C1 to Barnesville is entitled to consideration as a first local service. At the reference site, we recognize that Station **KRVI** will provide a 70 dBu signal to 53.6% of the Fargo-Moorhead Urbanized Area. We are concerned with the potential migration of stations from lesser served rural areas to well-served urban areas. Even though the reallocation of Channel 236C1 to Barnesville and modification of the Station **KRVI** will now not involve a change in transmitter site, we will not blindly apply a first local service preference of the FM allotment priorities when a station seeks to reallocate its channel to a suburban community in or near an Urbanized Area. In making a first local service preference determination, we consider the extent the station will provide service to the entire Urbanized area, the relative populations of the suburban and central city, and, most importantly, the independence of the suburban community.¹⁰

9. The first area of inquiry concerns the extent a station will provide service to the entire Urbanized Area. As stated above, the proposed reallocation would result in Station **KRVI** continuing to provide a 70 dBu service to the Fargo-Moorhead Urbanized Area. This does not support a conclusion that Barnesville is not entitled to consideration as a first local service. As a Class C1 facility, the 70 dBu contour will extend 50 kilometers and invariably serve a large area, including an Urbanized Area of only 99.3 square kilometers. Our second area of inquiry involves the relative populations of Fargo, North Dakota, Moorhead, Minnesota, and Barnesville, Minnesota. The 1990 U.S. Census population of Barnesville is 2,066 persons, whereas the respective populations of Fargo and Moorhead are 74,111 and 32,295 persons. Thus, the Barnesville population is 2.8% of the population of Fargo and 6.4% of the

⁷ The reference coordinates for the Channel 236C1 allotment at Barnesville, Minnesota, are now **46-40-27** and **96-13-39**.

⁸ The reference coordinates for the Channel 233C1 allotment at Enderlin, North Dakota, are **46-25-00** and **97-15-00**.

⁹ *Sister Bay, Wisconsin and Escanaba, Michigan*, 15 FCC Rcd 22455 (MM Bur. 2000); *Fair Bluff, North Carolina*, 11 FCC Rcd 12662 (MM Bur. 1996); *Topsail Beach, North Carolina*, 3 FCC Rcd 959 (MM Bur. 1988).

¹⁰ See e.g. *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951); *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990); *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988). In *Faye and Richard Tuck*, the Commission set forth eight factors in assessing the independence of a specified community: (1) the extent to which the community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's needs and interests; (3) whether the community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local phone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies upon the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries. We have considered a community as independent when a majority of these factors demonstrate that the community is distinct from the urbanized area. *Parker and St. Joe, Florida*, 11 FCC Rcd 1095 (MM Bur. 1996); *Jupiter and Hobe Sound, Florida*, 12 FCC Rcd 3570 (MM Bur. 1997).

population of Moorhead. Such percentages have not precluded favorable consideration as a first local service.¹¹ Our third, and most important, inquiry is the independence of Barnesville from the Urbanized Area. In order to address the arguments contained in the Triad Broadcasting and Enderlin Broadcasting Petitions for Reconsideration, we will evaluate the Barnesville proposal using each of the eight factors outlined earlier. A majority of these factors support a finding of independence from the Fargo-Moorhead Urbanized Area.

10. The first factor is the work patterns of the Barnesville residents. In this connection, T&J Broadcasting specifically identifies the Barnesville Care Center employing over 100 persons, the Barnesville School District employing 87 persons the Barnesville City Government employing 33 persons, and Deans Bulk Oil employing 29 people. T&J Broadcasting also states that Barnesville residents are employed at local establishments including local restaurants, grocery stores, the Barnesville Area Clinic, physician's offices, the Barnesville Collision Center, Braten Accounting, as well as clothing, convenience and farming supply stores. In its Petition for Reconsideration, Triad Broadcasting refers to a study from Moorhead State University estimating that "approximately 65% of the working class" of Barnesville work in the Fargo-Moorhead Urbanized Area, and that only 367 persons are actually employed in Barnesville. In this instance, the number of jobs in Barnesville is significant and sufficient to support a favorable finding on this factor.¹² In view of the fact that T&J Broadcasting provided specific information on substantial employment within Barnesville, we see no public interest reason to determine whether or not this total constitutes a majority of the working population in a community of 2,006 persons." In regard to the second factor, whether the smaller community has its own newspaper or other media that covers the community's needs and interests. Barnesville has its own weekly newspaper, the Barnesville Record-Review, published solely for Barnesville. This newspaper carries Barnesville news and advertising, coverage of local events and features on community leaders. The fact that a Fargo newspaper is available in Barnesville does not preclude a favorable finding on this factor.¹⁴

11. In regard to the third factor, perception of community leaders and residents, T&J Broadcasting refers to 30 community organizations that sponsor and organize local events such as the Potato Days Festival and the Hometown Christmas Celebration. While Triad Broadcasting is correct in stating that T&J Broadcasting has not submitted any letter from a local official or community leader to the effect that Barnesville is separate from the Fargo-Moorhead Urbanized Area, we do believe that the existence of elected government officials, local civic organizations and civic activities are probative of a perception that Barnesville is, in fact, separate from an Urbanized Area 25 miles away. The fourth factor, local government and elected officials, clearly support a determination concerning the independence of Barnesville. The Barnesville city government is comprised of an elected mayor and six member city council. The Barnesville city government employs 33 residents and has an administrative staff including a city administrator, finance officer, telephone operations manager, records manager, customer service representative and city attorney. Similarly, factor 5, local telephone directory and zip code, support a determination that Barnesville is independent of the Urbanized Area. Barnesville has its own zip code and local post office. In addition, the city owns the local phone company, providing local, long distance, internet access, and a local telephone directory.

¹¹ See e.g. *Ada, Newcastle and Watonga, Oklahoma*, 11 FCC Rcd 16896 (MM Bur. 1996); *Sorland Neck and Pinetops, North Carolina*, 7 FCC Rcd 5113 (1992).

¹² Cf. *Coolidge and Gilbert, Virginia*, 11 FCC Rcd 3610 (MM Bur. 1996) (approved reallocation to Gilbert when 13% of the Gilbert working population worked in Gilbert).

¹³ Cf. *Pleasanton, Bandera, Hondo and Schertz, Texas*, 15 FCC Rcd 3068 (MM Bur. 2000) (approved reallocation to Schertz even though the proponent did not identify employment opportunities in Schertz).

¹⁴ Cf. *Ada, Newcastle and Watonga, Oklahoma. supra* (approved reallocation to Newcastle even though Newcastle has only a weekly newspaper and a daily Oklahoma City newspaper is also available in Newcastle).

12. It is also our view that factor **6**, whether the community has its own commercial establishments, health facilities, and transportation systems, supports a conclusion that Barnesville is independent of the Fargo-Moorhead Urbanized Area. Barnesville has a variety of commercial establishments including four grocery stores, convenience stores, clothing stores, a bakery, barber, motel, auto body repair shop and eight restaurants. Barnesville has a doctor, two dentists, its own medical clinic and a nursing home. Barnesville also has a municipal airport. The fact that some residents may travel to Fargo for shopping or may use of the Dakota Hospital in Fargo does not obviate a favorable finding with respect to factor 6. Our evaluation of factor 7, the extent the specified community and central city are part are part of the same advertising market, suggests that Barnesville is part of the same advertising market. Barnesville is located within both the Fargo-Moorhead Arbitron Metro and the Fargo-Moorhead Designated Market Area. On the other hand, factor 8, the extent to which the specified community relies upon the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries, supports a favorable finding. Barnesville has its own municipally owned water and sewer service, electric utility, local telecommunications service, cable TV, and garbage and recycling center. In addition, Barnesville has its own local police department, volunteer fire department, ambulance service, elementary and high schools, public library, daycare center, two parks, a golf course, an animal control service and camping sites.

13. Triad Broadcasting also contends that awarding Barnesville a preference as a first local service is inconsistent with the Commission decision in *RKO General, Inc. (KFRC)*.¹⁵ In this regard, Triad Broadcasting argues that the in decision in *RKO General, Inc. (KFRC)*, in which the Commission did not afford Richmond, California, a preference as a first local service, is “controlling authority.” We disagree. That proceeding involved a six-way comparative hearing for the facilities of former AM Station KFRC, San Francisco, California. Two of the applicants specified Richmond, California, as their proposed community of license even though they had proposed facilities and coverage identical to the facilities and coverage by the other applicants who had proposed San Francisco as the community of license. In order to preclude an anomalous and artificial resolution of that comparative application proceeding, the Commission did not afford Richmond a dispositive preference as a first local service. Even though the communities of Richmond and Barnesville have similar characteristics regarding independence from an Urbanized Area, the situations ~~are~~ distinguishable. Unlike that proceeding, T&J Broadcasting did not propose an allotment to Barnesville which had been previously licensed to Fargo. Similarly, T&J Broadcasting did not seek a preference as a first local service to Barnesville at the expense of a competing applicant who has proposed identical facilities as a Fargo station. Rather, as required by *Community of License*, it is incumbent upon us to determine whether this reallocation proposal would result in a preferential arrangement of allotments. It is our view that reallocation Channel 236C1 from Detroit Lakes to Barnesville as a first local service does, in fact, result in a preferential arrangement of allotments.¹⁶

14. We also reject the Triad Broadcasting argument that the proposal to reallocate Channel **236C1** to Barnesville should not be entertained because it would contravene our multiple ownership requirements as set forth in Section **73.3555** of the Rules. At the outset, at the modified reference site discussed earlier, there will no longer be overlap of the **70** dBu contours of Station **KRVI** and commonly owned Station K DAM (formerly KCHY), Hope, North Dakota. In any event, a rulemaking proceeding involves a technical and demographic analysis of competing proposals in the context of Section **307(b)** of the Act. In order to achieve an efficient and orderly transaction of ~~both~~ the rulemaking process and the subsequent application process, any issue with respect to compliance with Section **73.3555** of the Rules will be

¹⁵ 5 FCC Rcd 3222 (1990); see also *Huntington Broadcasting Co. v. FCC*, 192 F.2d 33 (D.C. Cir. 1951).

¹⁶ See also *Suburban Community Policy, the Berwick Doctrine, and the DeFacto Reallocation Policy*, 93 FCC 2d 436 (1983), *recon. denied*, 56 RR 2d 835 (1984), *aff'd sub nom. Beaufort County Broadcasting Co. v. FCC*, 787 F. 2d 645 (D.C. Cir. 1986).

considered in connection with the application to implement this reallocation

15. In its Consolidated Opposition to Petitions for Reconsideration, Clear Channel notes that Enderlin Broadcasting did not file a timely expression of interest in filing for the allotment at Enderlin that it proposed in its counterproposal. Ordinarily, we would not accept an untimely expression of interest.” However, in view of our action revising the reference coordinates for the Channel 236C1 allotment at Barnesville, we will allot Channel 233C1 to Enderlin because it does not preclude a first local service to Barnesville.¹⁷ For this reason, we see no public interest benefit in dismissing the Enderlin Broadcasting Counterproposal.

16. Accordingly, pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission’s Rules, **IT IS ORDERED**, That effective January 30, 2003, the FM Table of Allotments, Section 73.202(b) of the Commission’s Rules, **IS AMENDED**, with respect to the community listed below, to read as follows:

<u>Community</u>	<u>Channel No.</u>
Enderlin, North Dakota	233C1

17. A filing window for the Channel 233C1 allotment at Enderlin, North Dakota, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent **Order**.

18. **IT IS FURTHER ORDERED**, That the aforementioned Petition for Reconsideration filed by Triad Broadcasting Company, LLC and the Petition for Reconsideration filed by Enderlin Broadcasting Company **ARE GRANTED** to the extent indicated above.

19. **IT IS FURTHER ORDERED**, That this proceeding **IS TERMINATED**.

20. For further information concerning this proceeding, contact Robert Hayne, Media Bureau, (202) 418-2177.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
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Media Bureau

¹⁷ *Butler and Reynolds, Georgia*, 17 FCC Rcd 1653 (MM Bur. 2002).

¹⁸ *Smith and Reno, Nevada, and Susanville and Truckee, California*, 12 FCC Rcd 3739 (MM Bur. 1997).